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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1963.

No. 415

HARRY IRWIN, HARRY NITZSCHE, JAMES ROGERS, JOHN FINN, TONY AVOLA, PETER HECKE, KARL ZAPF, WALTER WILLIAMS, MURVALE GUIBOR, THOMAS LaROCCA, BERNARD ANSELMO, DANIEL MORIARITY, MICHAEL BUFFA, ELMER SHIRLEY, JOHN MANGIAPANELLO, RAYMOND BUDO and HENRY LANE,
Petitioners,

vs.

GLOBE-DEMOCRAT PUBLISHING COMPANY, a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Missouri.

WILLIAM A. GEARY, JR.,
318 North Eighth Street,
St. Louis 1, Missouri,
Attorney for Petitioners.

ST. LOUIS LAW PRINTING CO., INC. 415 N. Eighth Street. CEntral 1-4477.

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PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Missouri.

To the Honorable The Supreme Court of the United States of America:

Petitioners respectfully petition this Honorable Court to grant the Writ of Certiorari to the Supreme Court of Missouri in the above case. In this behalf, petitioners show unto the Court:

OPINION OF THE COURT BELOW.

Harry Irwin, Harry Nitzsche, James Rogers, John Finn, Tony Avola, Peter Hecke, Karl Zapf, Walter Williams, Murvale Guibor, Thomas LaRocca, Bernard Anselmo, Daniel Moriarity, Michael Buffa, Elmer Shirley, John Mangiapanello, Raymond Budo and Henry Lane, Plaintiffs (Respondents) v. Globe-Democrat Publishing Company, a corporation, Defendant (Appellant).

The opinion of the Supreme Court of Missouri is reported at 368 S. W. (2) 452; Motion for Rehearing, Or, To Transfer to Court En Banc Denied, ibid, 458, and it is set out verbatim in Appendix A.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is based upon the Act of Congress of June 25, 1948, c. 646, Sec. 1, 62 Stat. 929, Title 28, U. S. Code, Sec. 1257. (3) providing that this Court may, by writ of certiorari, review any final judgment or decree rendered by the highest court of a state in which a decision could be had, where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, The United States.

Judgment of the Supreme Court of Missouri, Division No. 2, sought to be reviewed, was entered on the 8th day of April, 1963 (R. 592) and is set out in Appendix B.

Thereafter on the 23rd day of April, 1963, the petitioners filed a Motion for Rehearing, or, in the Alternative, for Transfer to the Court En Banc (R. 604) and Suggestions in support of said Motion (R. 604) and these are completely set out as Appendices C and D.

Thereafter on the 4th day of June, 1963, the Supreme Court of Missouri overruled petitioners' motion for rehearing and overruled petitioners' motion to transfer to the court en banc, and said judgment then became final (R. 627). The order overruling said motions is contained in Appendix E.

Motion to recall mandate sent down to the trial court reversing judgment of the trial court was allowed by the Supreme Court on August 7, 1963. This order extends the recall 90 days from June 4, 1963; a certified copy of same is filed separately with transcript and exhibits.

Division No. 2 of the Supreme Court of Missouri upon its refusal to transfer the cause to the court en banc was the highest court of the state in which a decision could be had in said cause; and by reason of the decision rendered by the said court it is claimed petitioners' rights have been contravened under the Fourteenth Amendment to the United States Constitution; Sec. 304, (a) of the Labor Management Relations Act of 1947, 29 U. S. C. A., Section 185 (a); the Seventh Amendment to the United States Constitution and applicable decisions of this court.

QUESTIONS PRESENTED FOR REVIEW.

1. Whether, the state court erred as a matter of federal substantive law in construing a collective bargaining agreement and in deciding as a matter of law on April 8, 1963, that respondent-employer in an industry affecting commerce had not violated its provisions, thereby reversing a prior jury verdict in favor of petitioners who, as individual employees; charged violation of the agreement by reason of employer's failure to pay them "dismissal pay" under that clause of the agreement which provided such pay to an employee "laid off to reduce the force", and, who submitted their charge on that theory.

2. Whether, under the circumstances and federal standards aforesaid, the state court usurped the function of the jury by re-examining the facts and reversing the judgment entered thereon and by holding that the circumstances of the case did not warrant the finding that petitioners were "laid off to reduce the force" but rather were "discharged" and that no obligation for such dismissal payment existed.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

The constitutional provisions involved are:

The Fourteenth Amendment, United States Constitution (Appendix F);

The Seventh Amendment, United States Constitution (Appendix G).

The Statutes involved are:

29 U. S. C. A., Sec. 185 (a), Section 301 (a), The Labor Management Relations Act of 1947 (Appendix H);

28 U. S. C. A., Sec. 1257, June 25, 1948, c. 646, 62 Stat. 929 (Appendix I).

STAGE, MANNER AND METHOD OF RAISING THE FEDERAL QUESTION.

Petitioner's first assignment of error was not raised until after the state appellate court ruling. Then, by motion for rehearing, or in the alternative, for transfer to the court en banc and suggestions filed in support thereof, the Federal questions sought to be reviewed were expressly raised.

The outright reversal of April 8, 1963 came eleven months after the case was argued and submitted to the state appellate court on May 1, 1962. This is significant

because during this interim the United States Supreme Court decided,* on December 10, 1962, that under Section 301 (a) of the Labor Management Relations Act of 1947, federal law is applicable to suits initiated by individuals in state courts for violation of collective bargaining agreements.

Because of this new complexion in the field of labor relations which came into being after this cause was argued and submitted to the state appellate court, it became necessary to view the reversal in this new light. The first opportunity to do this was in petitioner's Motion for Rehearing, etc., and Suggestions (R. 604) in which five points are raised, the four below forming the basis for the questions presented here for review.

1. The opinion of the state court has contravened Section 1 of the Fourteenth Amendment to the United States Constitution (Motion for Rehearing, paragraph 2, page 2, or (R. 606, 611). This was not discussed by the state court in its opinion, nonetheless must be taken as overruled along with the entire motion.

2. By its opinion the state court does not take into account Section 301 (a) of The Labor Management Relations Act of 1947 [29 U. S. Code, Section 185 (a)]. Motion for Rehearing, paragraph 2A, page 2, or (R. 606, 611, 612). This was discussed by the state court at 368 S. W. 2d, l. c. 458, 459, and overruled.

3. The state court's opinion has contravened the Seventh Amendment to the Constitution of the United States. Motion for Rehearing, paragraph 3, page 2, or (R. 606).

4. The state court's opinion has usurped respondent's (petitioner's) right to a trial by jury. (Motion

* Smith v. Evening News Ass'n, 371 U. S. 195, 83 S. Ct. 267.

for Rehearing; paragraph 1 page 1, or (R. 605).) This was not discussed by the state court in its opinion, nonetheless must be taken as overruled along with the entire motion.

STATEMENT OF MATERIAL FACTS.

Under the pleadings (R. 3, 7), it was admitted that plaintiffs-petitioners were individual employees employed pursuant to a collective bargaining agreement. They are members of the St. Louis Paper Handlers, Sheet Straighteners and Stock Room Employees Union, No. 16 affiliated with the International Printing Pressmen and Assistants Union of North America and have been certified by the National Labor Relations Board as the exclusive collective bargaining agent for all employees covered by the agreement (Plaintiffs' Exhibit 1, Art. I, Sec. 1). It was stipulated (R. 17) and proved (R. 64) that the collective bargaining contract which expired by its terms December 31, 1958 was in effect February 27, 1959.

Respondent here, (defendant) is a newspaper publishing company engaged in an industry affecting commerce as defined in the Labor Management Relations Act of 1947. 29 U. S. Code, Secs. 142, 152.

It was further admitted (R. 3, 8), that the contract contained the following provisions respecting dismissal pay:

> "**Article XII, Dismissal Pay**: Sec. 1. In the event of merger, consolidation or permanent suspension of publication by any newspaper covered by this Agreement all employes who lose employment thereby shall receive dismissal pay as follows:
>
> "(a) Employes who have held regular situations for more than six (6) months but less than one (1) year shall be paid six (6) weeks' dismissal pay.

"(b) Employes who have held regular situations for more than one (1) year shall be paid twelve (12) weeks' dismissal pay.

"Sec. 2. Any employe who has held a regular situation for one (1) year or more who is laid off to reduce the force shall receive dismissal pay on the basis of one (1) week's pay for each year of continuous priority.

"Sec. 4. When an employe is laid off due to a reduction in force, he shall hold re-employment rights in the chapel from which he was laid off for a period of one (1) year. Refusal of an employe to take a job in chapel, when called back to work, shall waive his re-employment rights."

It was further admitted (R. 4, 8):

"6. That on February 27, 1959 the defendant, Globe-Democrat Publishing Company, was being struck by the St. Louis Newspaper Guild; that defendant Globe-Democrat Publishing Company did then give representatives of Paper Handlers Union, Local 16, notice of the sale of the physical property of the Globe-Democrat Publishing Company to the Pulitzer Publishing Company, thereby reducing the overall operation of the Globe-Democrat Publishing Company and discontinuing all mechanical operations including the operations theretofore performed by plaintiffs."

On February 21, 1959 at 3:00 a. m. a group of editorial and other employees belonging to the St. Louis Newspaper Guild, a labor union not directly affiliated with the union to which plaintiffs belongs went on strike and set up a picket line around the defendant's place of business (R. 166, 30). The defendant's production manager gave the order at that time to "strip down the presses and send the paper handlers home" (R. 185).

Later in the morning the petitioners on the day shift appeared outside the building (R. 210, 268, 330, 349, 369, 430) and plaintiffs' foreman Moriarity saw the pickets (R. 211), saw no one working (R. 211), and saw everybody standing around (R. 211).

Plaintiff Lane testified he received a letter from defendant's publisher at 2:30 p. m. (R. 194) or 3:00 p. m. (R. 195) on February 21st. The letter stated in part (R. 33 et seq.) as follows:

> "I regret very much that the Globe-Democrat will not be able to publish its Sunday edition because of a strike by The St. Louis Newspaper Guild. It does not appear probable that publication will be resumed in the immediate future . . ."

In answer to whether he declined to cross the picket line, Lane said (R. 199):

> "A. No. I was told by Mr. Amberg there wouldn't be no Sunday edition, so that's what I would have had to do, I did every Saturday night when I went in, printed a Sunday edition. He said there wasn't to be a Sunday edition."

The production manager testified it was the publisher's decision not to print that portion that was normally printed on the Sunday edition (R. 156, 157). He further testified that the publisher gave no orders on February 21st concerning the operation or publishing of the newspaper, nor on February 22, 23, 24, 25, 26, and 27th (R. 168). The mechanical equipment that was used by the paper handlers in the performance of their duties included Towmotors, Grabbers, Knives, and the Conveyor System used to transport the newsprint to the dollies on which it was placed (R. 166). This equipment was not owned by the respondent after February 27th (R. 166). It was not

possible for petitioners to perform their duties as paper handlers without the use of these tools (R. 168, 169, 370, 424).

On February 27, 1959 the publisher sent to each plaintiff a letter announcing the sale of their physical properties to Pulitzer Publishing Company, the publisher of the St. Louis Post-Dispatch (R. 43), reading in part as follows:

> "To effect greater economy and efficiency in mechanical operation, The Globe-Democrat today entered into an agreement with the St. Louis Post-Dispatch under which The Globe-Democrat will be printed by the Post-Dispatch, when and if the Guild strike is settled.
>
> The sale is of the physical property only. The editorial, advertising, circulation and business departments of the two newspapers will be entirely separate. The Globe-Democrat will continue as a completely independent newspaper in every sense of the word.
>
> The consolidation of mechanical operations between competing newspapers finds great precedent in many cities throughout America, a list which we suspect may grow larger in the future as the mechanical costs of publishing a daily newspaper continue to rise. The editorial, advertising, circulation and business independence of these newspapers has not in any way been affected. I assure you that it will not be affected in St. Louis."
>
> * * * * * * *
>
> "Members of the mechanical unions will be employed on a priority basis in the consolidated mechanical operation. If they all cannot be employed, the dismissal provision of the current mechanical contracts will apply. * * *"

Defendant's personnel director testified that before the strike, respondent employed "about 850 or 900" (R. 405) and following the strike, "about 350 or 400". (R. 405).

Plaintiffs availed themselves of grievance procedures under the bargaining agreement (R. 6, 8) but waived arbitration by stipulation (Plaintiffs' Exhibit 6) so the matter could be judicially determined (R. 6, 8). The trial court submitted the case to the jury under written instructions and the jury returned a unanimous verdict in favor of petitioners and assessed their damages in the sum of $20,260.90 exclusive of interest and costs (R. 509, 510).

Before it could return a verdict the jury was required to find that on February 27, 1959 the land and buildings, together with all the presses, machinery, equipment and other personal property (comprising the newspaper printing plant owned by the Globe) were sold by the Globe to Pulitzer; and that the work normally performed by the petitioners was to be performed upon resumption of publication of the Globe by employees of the Pulitzer under a contract between the two said publishing companies entered into on or about the same date; and that as a result of the said sale of the newspaper printing plant of defendant and of the contract providing for performance of plaintiffs' duties by employees of Pulitzer that plaintiffs were laid off to reduce the force employed by defendant as set out in Article XII, Section 2 of the collective bargaining contract (R. 503, 505).

The trial court refused respondent's instruction A (R. 508) which would have defined the phrase "laid off to reduce the force" to mean a temporary suspension of employment with the expectation that the employee will or may be recalled to work and excluding from the definition any connotations of a permanent termination of employment.

The trial court accepted the verdict of the jury and entered judgment thereon. Thereafter defendant's motion for judgment, or, a new trial was overruled (R. 516). The defendant appealed to the Supreme Court of Missouri which court reversed the judgment (R. 593-603), holding, inter alia:

> "In the absence of some reason to require a different rule, and we find none here, 'the test of the meaning, of words commonly used, should be their ordinary and popular meaning; and should not be construed in the broadest sense possible to include meanings to which they would not be applied by most people'" (R. 602-603).

And further that:

> "Petitioners were not 'laid off to reduce the force' but were discharged, or at least their employment with the respondent was permanently terminated" (R. 603).

In conclusion the state court said:

> "The terms of the collective bargaining agreement upon which plaintiffs rely do not impose an obligation on the Globe-Democrat to pay to the plaintiffs 'dismissal pay' under those circumstances, and no obligation for such payment exists in the absence of an agreement" (R. 603).

Thereafter, the plaintiffs' (respondents') Motion for Rehearing, or in Alternative for Transfer to the court en banc was overruled (R. 627) and a per curiam opinion of the state court filed (R. 628). Review is now sought of that final judgment.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The State Court By Its Decision And Judgment In This Cause Reached By Applying Local Law And Holding "The Collective Bargaining Agreement Is Subject To The Same Rules Of Interpretation As Other Contracts," (R. 598) Denied Petitioners A Right Guaranteed Them By The Fourteenth Amendment To The Federal Constitution And Claimed By Them At Their First Opportunity To Do So, Thereunder, And Under Section 301 (a) Labor Management Relations Act of 1947. The Claim Is The Right To Equal Protection Of The Law In the Field Of Labor Relations Which Has Been Held By The Supreme Court Of the United States To Require The Application Of Federal Substantive Law To Violations Of Collective Bargaining Agreements.

2. The State Court In Deciding This Case Adversely To Petitioners' Claim Of Violation Under Their Collective Bargaining Agreement With Respondent-Employer Has Resolved The Question Of Construction In A Way Probably Not In Accord With Applicable Decisions Of This Court.

3. The State Court, By Its Decision And Judgment Has Incorrectly Decided A Federal Question Of Substantive Law Not Heretofore Determined By This Court, Namely, Whether The State Court Incorrectly Re-examined The Facts As Found By The Jury And Substituted Its Own Finding Contrary To The Verdict And Judgment Of The Trial Court And In Violation Of The Seventh Amendment To The United States Constitution.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

A. The State Court's Decision and Judgment in This Cause Reached by Applying Local Law Was Erroneous and Denied Petitioners a Right Guaranteed Them by the Fourteenth Amendment.

The premise that, the courts shall not approach the problem of construction of collective bargaining agreements as to individuals suing thereunder, by the same strict rules that govern other types of contracts is gained from several U. S. Supreme Court and Federal Appellate Decisions but the point itself was first made in the **Evening News Case**, 371 U. S. 195, 83 S. Ct. 267, December 10, 1962 (to be discussed later), and more recently discussed in **Belk v. Allied Aviation Service, Inc.**, 52 L. R. R. M. 2706 (2nd Cir.), decided March 25, 1963.

The court in the case of Belk v. Allied Aviation Service, Inc., said at 52 L. R. R. M. 2708-09:

> "The Supreme Court by virtue of **Evening News** has now committed the Federal Courts to fashioning a body of law encompassing the rights of all parties concerned in the bargaining process" . . . "strict use of any of these analogies ("the reference here is to third party beneficiary, agency and trust theories) leads to insurmountable difficulties, arising primarily from the fact that collective bargaining agreements are to a large degree sui generis . . . That is not to say that resort to established principles of law in these areas cannot at times be useful, but only that these agreements do not fit snugly into any one category. For example, a collective agreement is made

for the benefit of the employees (at least in part), but a third party beneficiary is not bound by the contract under usual third party beneficiary rules. Certainly such a rule in the labor field might well lead to chaos and would be totally inconsistent with the purpose of such agreements." (Ours).

This is the point that petitioners submit is made here, that old stock, local law, and third party beneficiary and non-collective bargaining contract theories which this state court relied upon as quoted and demonstrated below, are reviewable by federal authority and must give way to federal substantive law in deciding suits as brought here by individual employees to enforce a collective bargaining agreement.

Contrary to our point and to our authorities cited above, the Missouri Supreme Court held in this decision:

"The process of collective bargaining over the terms of a labor contract, at least in theory, results in demands, counter-demands and concessions until an agreement is reached. It is not the situation where one party presents a written proposed agreement subject only to the acceptance as presented or rejection. The process of collective bargaining necessarily implies that the terms of an approved agreement were thoughtfully prepared by persons **seeking to express the precise agreement** between the parties. In the absence of some reason to require a different rule, and we find none here, 'the test of the meaning, of words commonly used, should be their ordinary and popular meaning; and **should not be construed in the broadest sense possible to include meanings to which they would not be applied by most people**'. Cleaver v. Central States Life Ins. Co., 346 Mo. 548, 142 S. W. 2d 474, 129 A. L. R. 1004" (R. 602, 603) (Emphasis ours).

Previously (R. 598), it had stated: "In determining whether the termination of employment at the time for the reasons asserted by plaintiffs constituted one of the specific situations in which dismissal pay is required to be paid, the collective bargaining agreement is subject to the **same rules of interpretation as other contracts**, and should be realistically construed to accomplish its evident aims. 56 C. J. S. Master & Servant, Section 28 (41) a." (Emphasis ours.)

Precise agreements, narrow meanings held even by "most people" and pat rules of "other" contract interpretation do not accord with the above rulings in the **Beik** and **Evening News** cases nor with guidelines of "judicial inventiveness" spoken of by Justice Douglas in **Lincoln Mills** and "federal labor law" described in the **Lucas Flour** and **Dowd Box** cases, all of which cases are discussed below:

The later attempts by the state court to rehabilitate its earlier opinion by per curiam opinion after Motion for Rehearing, etc. (R. 628), after it was pointed out not to be following these federal standards, are shallow indeed. Mere lip service is given to the proposition that federal standards were, or ought to be applied. Examination of the decision demonstrates to the reader the state court's preoccupation with ordinary contract law. Says the state court:

"However, if in a suit in a state court on a collective bargaining agreement by an employee we are required to apply 'Federal substantive law,' and we did not do so and the result reached is contrary to such law, then plain error would have resulted (R. 629); and at (R. 630, 631):

"In the preparation of the principal opinion we ruled the issues by giving the language of the contract **its normal meaning** and in accordance with **its**

accepted usage.' In determining this meaning we look not only to the one federal case and the numerous state cases cited by respondents, but we also look to and relied on other cases found by us in the course of our research including two cases in the lower federal courts and one opinion of the U. S. Supreme Court" (Emphasis ours).

An examination of the cases relied on demonstrates little relevancy to the case at hand. These so-called applicable decisions were not adequately discussed. Were they controlling? Do they represent the federal substantive law as they will surely become in Missouri if the state court judgment stands? These are the questions petitioners lay before this honorable court and about which they contend the dimensions of the Fourteenth Amendment require they be answered.

The court finally said: ". . . plaintiffs certainly have not demonstrated that on the merits we reached an incorrect result" (R. 631)—while preferring not to say directly the jury reached an incorrect result. Yet, their decision ignores completely the substance of the holding in point in the **Public Ledger Case**:* the accepted definition of "Dismissal Compensation" in connection with a "layoff" stated by Hawkins in his treatise on Dismissal Compensation (Princeton University Press: 1940), page 5; also at 147 A. L. R., n. 151; waives off the discussion and substance of the arbitrated cases cited (Standard Oil Co. of California, 31 Labor Aribtration Reports 472; Brooklyn Eagle, Inc., 32 Labor Arbitration Reports 157); and the definition of "layoff" from the Dictionary of Labor Law Terms (C. C. H., 1953); it also avoids any explanation of the rationale of why dismissal pay is bargained for and contracted for. In brief, it completely evades the substance of the question, if it is one for con-

* 161 F. 2nd 762.

struction, and if it is, what that construction is under standards of federal labor policy. It prefers to follow a proposition rejected by the trial court as evidence (R. 417, 418), and instructions (R. 541).

A significant fact is that in not one federal or state case cited has the right to dismissal payments been judicially denied or impaired where the eligibility terms in the contract had been satisfied. Petitioners submit the finding of the jury in the instant case, namely, (1) the circumstances which terminated their employment, (2) the consequent reduction in work force, and (3) employer's failure and refusal to pay petitioners the members of that work force dismissal pay as provided by the collective bargaining agreement, constitute the eligibility.

If the "local law" erroneously applied by this state court decision is at the expense of federal standards, petitioners have been denied the equal protection of the law guaranteed them by the Fourteenth Amendment to the U. S. Constitution.

B. The Federal Question Here Raised by Petitioners Was Claimed at Their First Opportunity.

"The settled doctrine is that when a constitutional privilege or immunity has been denied for the first time by a ruling made upon appeal, a litigant thus surprised may challenge the unexpected ruling by a motion for rehearing and the challenge will be timely." Mo. ex rel. Missouri Insurance Company v. Gehner, Assessor of the City of St. Louis, et al., 281 U. S. 313 at 320.

". . . A federal claim first raised by petition for rehearing in a state court is in time for the purpose of review if the occasion for it arose unexpectedly from the grounds of the state court decision." Great

Northern Railway v. Sunburst Oil Company, 287 U. S. 358 at 366.

Coming within the above rules, petitioners could not earlier have assailed the court's opinion because (1) they were under no duty to anticipate the state court's action before it was handed down on April 8, 1963, and (2) before the **Evening News Case** of December 10, 1962, review of similar state court actions for alleged violation of collective bargaining agreements were denied and held not subject to the same scrutiny under Section 301 and along federal standards as **Evening News**, supra, had held them to be. Therefore, at the time of petitioners' appeal, petitioners were without notice that Section 301 of the Labor Management Relations Act of 1947 and applicable federal law had any meaning as to them. Following the adverse judgment of the state court, petitioners raised the federal questions at their first opportunity on motion for rehearing or in the alternative for transfer to the court en banc (R. 604).

In the case of Herndon v. Georgia, 295 U. S. 441, it was held:

> "There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented at the first opportunity for raising it." Citing, Sanders v. Shaw, 244 U. S. 317 at 320; Ohio v. Akron Park District, 281 U. S. 74, 79; Missouri, etc. v. Gehner, etc., 281 U. S. 313, 320; Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673, 677; American Surety Co. v. Baldwin, 287 U. S. 156, 164; Great Northern Railway v. Sunburst Oil Co., 287 U. S. 358, 367.

The further prerequisite for review set out in the **Herndon Case** is contained in this holding:

> "An attempt to raise a federal question before a state supreme court upon a petition for rehearing

after judgment, is too late, unless that court actually entertains the question and decides it." 295 U. S. 443.

That the state court entertained the federal questions and decided them (erroneously, petitioners contend) is obvious from a review of the state court's per curiam opinion. Now that the questions have been ruled upon, it can never be determined with finality whether they were ruled upon properly unless reviewed by this honorable court, the ultimate federal judicial authority.

Paraphrasing this court in its holding in the **Brinkerhoff Case**, 281 U. S. 673 at 678: It is plain that the practical effect of the judgment of Missouri is to deprive plaintiff of property without affording them an opportunity to be heard. Petitioners' assertion is an evasion of their substantive right under the federal constitution to equality of treatment, by reason of a state court ruling on what is now held to be federal substantive law.

C. The State Court by Its Decision and Judgment in This Cause Has Violated Petitioners' Rights Stemming From Section 301 (a), Labor Management Relations Act of 1947, 29 U. S. C. A., Section 185 (a), and Judicially Determined to Require the Application of Federal Substantive Law to Violations of Collective Bargaining Contracts.

The state court, in its opinion (R. 630), states:

"The 'body of substantive law' relied on by respondents in their motion for rehearing and in the suggestions in support thereof, consists of but one federal case (another federal case is cited in support of a different point) the same one cited in their original brief to this court, In Re Public Ledger, Inc., 161 F. 2nd 762 . . . etc."

This is almost to suggest that a single case—perhaps the only federal appellate decision in point may not be

either correct, or controlling, or both. Such error is manifest.

The state court was more occupied with the term "lay-off" (R. 598, 599) than with the qualifying phrase "to reduce the force" and the circumstances submitted to the jury in Instruction 1 (R. 503-5).

Public Ledger may be the "only" federal authority cited by petitioners but it is a clear example of the broad construction given terms of collective bargaining agreements by federal courts. The analogy and that part of the federal law for which **Public Ledger** stands, come swiftly and in a very brief part of the decision there—nonetheless it is there in these words:

> "It is our opinion that **the 'layoff' provisions of the contract are in fact provisions covering discharge as well as temporary layoffs.** They are a part of the wage compensation agreed upon and are entirely reasonable as protection to the workman against having his needed income stop without even a day to meet emergencies." 161 F. 2d at 770. (Emphasis ours.)

This holding envisions that "layoff" is meant to cover **permanent** as well as **temporary** severance from employment.

The line of cases (judicial and arbitration): **Public Ledger, Minnesota Tribune, Brooklyn Eagle, Press Publishings**, cited by petitioners suggest if not demonstrate that "dismissal pay" is familiar to the newspaper industry. Rationalization is hardly needed to determine why, but it is brought to the fore here so as to nail down the substance of the question here, what is in dispute and the pivotal reason behind the bargained-for-benefit. These things are elusive, if not non-existent in the state court opinion.

From that line of cases represented by the **Lucas Flour, Lincoln Mills** and the **United Steelworkers Trilogy** cases, cases requiring the application of federal substantive law, it becomes apparent this case cannot be decided in the strict, cramped quarters of local contract law, third party beneficiary rules, or even the "normal meaning of words." It must be decided consistent with the purpose of the agreement which in this case was a "dismissal pay" agreed upon so the individual employee if possible would not even lose a day from his employment. And this is in spite of the fact that neither of the parties necessarily had the precise circumstances of this case in mind when the terms of the agreement were negotiated and settled.

The state court called the contract "an approved agreement, thoughtfully prepared . . . to express **the precise agreement** . . ." (R. 602), and held:

> "Neither can we interpolate words into an agreement which are not there and thereby re-write the agreement to what third party beneficiaries of that agreement now argue the parties surely must have meant because otherwise the agreement does not favor cover, as to them, a situation which subsequently arose" (R. 603).

This is **not** the law as it was found to be in the case of **Livingston v. John Wiley and Sons,** 52 LRRM 2223 (2nd Cir.), decided January 11, 1963. There the conclusion of the court was reached despite the fact that the collective bargaining agreement contained no expression of the precise circumstance which the case turned on (that the terms of the agreement were to be binding upon the successors to the management company which was party to this agreement). The court held that it reached its conclusion in spite of the fact that neither of the parties had a possible consolidation in mind when the terms of the agreement was negotiated and settled:

"Not only would a contrary rule involve manifest injustice, a circumstance not to be lightly disregarded or brushed aside; it would be a breeder of discontent and unharmonious relations between employer and employee and a source of unnecessary and disrupting litigation." Ibid., at 2226.

II.

The State Court in Deciding This Case Adversely to Petitioners' Claim of Violation Under Their Collective Bargaining Agreement With Respondent-Employer Has Resolved the Question of Construction in a Way Probably Not in Accord With Applicable Decisions of This Court.

Since Textile Workers Union of America v. Lincoln Mills, 353 U. S. 448, 77 S. Ct. 912, 1 L. Ed. 2nd 972, on June 3, 1957, decided that Section 301, supra, has substantive content and that the law to apply in suits under 301 is federal law, which the courts must fashion from the policy of our national labor laws (ibid. 456):

"Resort to state law is (has been) permissible, but only in order to determine the rule best calculated to effectuate the federal policy of section 301. To the extent that state law is applied, it becomes 'absorbed as federal law' rather than existing as an 'independent source of private rights.' under the collective bargaining contract." (Emphasis ours.) Ibid. 457.

Chronologically, in our list of cases referred to above, the Steelworkers Trilogy came next in 1960. Of the three cases involved, the analogous point brought out best by the Supreme Court in its relation here is that in the United Steelworkers v. Warrior & Gulf Navigation Co., 363 U. S. 574 (June 20, 1960):

"The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. See Shulman (Reason, Contract, and Law in Labor Relations), 68 Harv. L. Rev. 999, 1004-1005. The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant . . ." (ibid. 580).

Continuing:

"Because of the compulsion to reach agreement and the breadth of the matters covers, as well as the need for a fairly concise and readable instrument, the product of negotiations (the written document) is, in the words of the late Dean Shulman, 'a compilation of diverse provisions: some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith.' Shulman, supra, at 1005 . . ." (ibid. 580).

And further:

"But the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which **meaning and content** are given to the col-

lective bargaining agreement." (Emphasis ours.) Ibid. 581.

When arbitration bogged down at the outset of the grievance alleged by this lawsuit, it was agreed and stipulated (Plaintiffs' Exhibit 6) that arbitration be bypassed in favor of this lawsuit. It follows then that the trial court and jury who decided this case initially took the place of the arbitrators in giving meaning and content at first hand to the agreement in question. The stipulation as it were, became part of the agreement or even a new collective bargaining agreement itself. Following this analogy it was as if in United Steelworkers v. American Mfg. Co., 363 U. S. 564 at 567-568, that the parties agreed to submit all questions of contract interpretation to the trial court.

Next, on February 19, 1962 this court ruled in the case of Charles Dowd Box Co., Inc., v. Courtney, et al., 368 U. S. 502 at 505-508, that Section 301 does not divest state courts of jurisdiction over suits for violation of collective bargaining contracts—in that case between the union representing employees and their employers.

Less than one month later on March 5, 1962, this court re-confirmed the holding in the **Dowd Box Case**, supra, and further re-confirmed the principle enunciated in **Lincoln Mills** and the **"Trilogy"** that "incompatible doctrines of local law must give way to principles of federal labor law." Local 174, Teamsters, etc., v. Lucas Flour Co., 369 U. S. 95 at 102.

And finally on December 10, 1962, this court removed any doubt that had existed as to whether Section 301 and federal substantive law applied to individual claims initiated in a state court under a collective bargaining contract by its holding in Smith v. Evening News, 371 U. S. 195, 83 S. Ct. 267. This was a suit brought by an

individual employee for back wages under a collective bargaining agreement against his employer newspaper company in a state court. This court held at 83 S. Ct. 270:

> "Individual claims which lie at the heart of the grievance and arbitration machinery, are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based. To exclude these claims from the ambit of 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law. This we are unwilling to do."

If petitioners are entitled to review under Section 301 (or the Court's discretion under U. S. Supreme Court Rule 19), petitioners submit that they are entitled to review in the whole ambit of federal substantive law stemming from that right as it is applied to their collective bargaining agreement and in accord with applicable decisions of this court.

The question at this time is petitioners' right to access to the only remaining procedure through which petitioners' grievance can be ultimately resolved.

III.

The State Court by Its Decision and Judgment Has Incorrectly Re-examined the Fact as Found by the Jury and Substituted Its Own Finding Contrary to the Verdict and Judgment of the Trial Court and in Violation of the Seventh Amendment of the United States Constitution.

The state court has not in a true sense construed the controlling phrase of the collective bargaining agreement,

"laid off to reduce the force." What it has done in its opinion and finding (R. 600, 603) is to re-construe the circumstances of the case holding that these facts and circumstances add up to a "discharge" or "permanent termination of employment."

Argument seems unnecessary to demonstrate that the facts of the case as found by the jury had to be re-examined in order to make this finding. Instruction No. 1 offered by the plaintiffs (R. 503-5) contains the pertinent findings of fact involved in the case and the state court was bound by the facts as contained there. By supplanting its own facts, the state court acted contrary to its own prior decision, that "the Appellate Court's function is exhausted when that evidentiary basis becomes apparent it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." Nance v. Atchison, T. & S. F. Ry. Co., 232 S. W. 2nd 547, 360 Mo. 980. It is as well, contrary to the federal rule. In Cross v. Pasley, 267 F. 2nd 824, it was held "it is not the province of the ruling court to infer material facts."

The issue was the jury's charge, that is, whether **the facts as found by** the jury constitute respondents being "laid off to reduce the force." No more, no less; no matter, whether of temporary or permanent duration. The issue is not, whether the **facts as found by the jury** constitute a "discharge."

The specific charge made in this section of petitioners' argument has not been judicially decided to petitioners' knowledge but it is now raised in view of the holding in the **Evening News** case, supra, which determines with finality that section 301 of the Taft-Hartley Act has substantive content and that federal law now must be applied even by state courts in ruling on violations of collective bargaining contracts.

Are the state courts, as a consequence, now sitting in deciding these cases as federal courts? Or, at least, are not the litigants affected by these decisions entitled to the full substantive law of the United States which includes the Seventh Amendment to the Constitution of the United States.

If the answers to these questions are in the affirmative, it follows that the court should have followed the federal law in construing the instant contract phrase as the federal courts have in the **Public Ledger**, supra. The re-examination of facts made by the state court in the instant case take this court's opinion into a direct clash with the re-examination provision of the Seventh Amendment and it is here urged that the state court erred in so doing.

The opinion of this court has usurped respondents' right to a jury trial because it has ruled diametrically to the finding of the jury. The question as to the meaning of the words "laid off to reduce the force" was presented to the jury by appropriate instruction and in finding in the favor of petitioners, it must be presumed that the jury found the meaning of these words to include a permanent layoff as well as a temporary one. Had this court ruled that the meaning of the words "laid off to reduce the force" was simply a matter of interpretation then it would have been a legal question for the court and this matter should not have been submitted to the jury. The court did not so rule.

PRAYER

For the reasons herein given, petitioners pray for a Writ of Certiorari directed to the Supreme Court of Missouri to the end that the judgment of that court may be reviewed

by this Court and reversed with directions that the judgment of the trial court be affirmed.

Respectfully submitted,

.....

WILLIAM A. GEARY, JR.,
318 North Eighth Street,
St. Louis 1, Missouri,
Attorney for Petitioners.

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APPENDIX A.

Opinion of the Supreme Court of Missouri, April 8, 1963.

(R. 593 to 603.)

In the
Supreme Court of Missouri,
Division Number Two.

Harry Irwin, Harry Nitzsche, James Rogers, John Finn, Tony Avola, Peter Hecke, Karl Zapf, Walter Williams, Murvale Guibor, Thomas LaRocca, Bernard Anselmo, Daniel Moriarity, Michael Buffa, Elmer Shirley, John Mangiapanello, Raymond Budo and Henry Lane,
Respondents,

v.

Globe-Democrat Publishing Company, a Corporation,
Appellant.

No. 49,026.

Appeal from the Circuit Court of the City of St. Louis,
The Honorable O. P. Owen, Judge.

This is an appeal from a judgment wherein seventeen plaintiffs were awarded "dismissal pay" in various amounts totaling $20,260.90 alleged to be due pursuant to the terms of a collective bargaining agreement between the St. Louis Paper Handlers, Sheet Straighteners and Stock Room Employees' Union No. 16 (hereafter referred to as "Local No. 16"), affiliated with the International Printing Pressmen and Assistants' Union of North Amer-

ica AFL-CIO, and the St. Louis Newspaper Publishers' Association, of which the Globe-Democrat Publishing Company (hereafter referred to as the "Globe-Democrat") was a member.

On February 21, 1959, certain employees of the Globe-Democrat who were members of the St. Louis Newspaper Guild, a labor union not directly affiliated with Local No. 16, went on strike and established a picket line at the Globe-Democrat's place of operations. Although the collective bargaining agreement, under which the plaintiffs as members of Local No. 16 were working and upon which this suit is based, provided that members of Local No. 16 had a right to decline to cross a picket line only when the picket line resulted "from a strike that has been sanctioned by the International Printing Pressmen and Assistants' Union of North America," and the Guild strike was not so sanctioned, the plaintiffs declined to cross the Guild picket line, or at least they did not do so. On the day the Guild strike started the publisher of the Globe-Democrat sent a letter to each plaintiff in which he stated, among other things, "I regret very much that the Globe-Democrat will not be able to publish its Sunday edition because of a strike by the St. Louis Newspaper Guild. It does not appear probable that publication will be resumed in the immediate future." On the following day the Globe-Democrat sent a telegram to the president of Local No. 16, which was received by him, in which it was stated that no "lockout" of the members of Local No. 16 existed and that "Any Globe-Democrat employee member of your Union who has presented himself today or continues to report for work at his accustomed place of work on his regular work days and hours will be put to work and paid his regular day's pay at the straight time rate until the work stoppage caused by the Newspaper Guild is ended or until further notice." No plaintiff presented himself for work.

On Febraary 27, 1959, the Globe-Democrat sold to the St. Louis Post-Dispatch all of its physical property for the printing of its newspaper and entered into a contract with the Post-Dispatch whereby it would print the Globe-Democrat newspaper when the Guild strike ended. A notice of this sale was furnished to the president of Local No. 16 and to each plaintiff. Prior to February 27, 1959 eleven of the plaintiffs had accepted employment with the Post-Dispatch, and shortly thereafter and before the Guild strike ended, the remaining plaintiffs accepted such employment. On May 27, 1959, the day the Guild strike terminated, a number of the plaintiffs and the president of Local No. 16 went to a place near the Globe-Democrat building and the president called the personnel director of the Globe-Democrat by telephone and asked "if they wanted them to come into the plant," and was advised that "they were no longer employed by the Globe-Democrat Publishing Company."

By this suit plaintiffs as third party beneficiaries, Baron v. Kurn, 349 Mo. 1202, 164 S. W. 2d 310, 142 A. L. R. 787, seek to recover "dismissal pay" pursuant to a collective bargaining agreement between Local No. 16 and the St. Louis Newspaper Publishers' Association, the relevant provisions of which are as follows:

> "Article XII. **Dismissal Pay.** Sec. 1. In the event of merger, consolidation or permanent suspension of publication by any newspaper covered by the Agreement all employes who lose employment thereby shall receive dismissal pay as follows:
>
> "(a) Employes who have held regular situations for more than six (6) months but less than one (1) year shall be paid six (6) weeks' dismissal pay.
>
> "(b) Employes who have held regular situations for more than one (1) year shall be paid twelve (12) weeks' dismissal pay.

"Sec. 2. Any employe who has held a regular situation for one (1) year or more who is laid off to reduce the force shall receive dismissal pay on the basis of one (1) weeks' pay for each year of continuous priority.

"Sec. 3. Dismissal pay shall be at the employe's regular straight time rate of pay as of the time of dismissal.

"Sec. 4. When an employe is laid off due to a reduction in force he shall hold re-employment rights in the chapel from which he was laid off for a period of one (1) year. Refusal of an employe to take a job in chapel, when called back to work, shall waive his re-employment rights."

Plaintiffs alleged in their petition that they "were laid off to reduce the force of defendant, thereby entitling them to receive dismissal pay under Sections 2 and 3 of Article XII of said Collective Bargaining Agreement." They further alleged the circumstances of the sale by the Globe-Democrat of its printing facilities, and that upon termination of the Guild strike on May 27, 1959, they presented themselves at the defendant's place of business "ready, willing and able to continue their employment, but plaintiffs were then notified of their lay-off by defendant." Prior to the trial each plaintiff made answers to interrogatories under oath and stated therein that the "last date he was employed by defendant" was May 27, 1959, and that "he was laid off by defendant at that time." Notwithstanding the allegations in their petition and the above answers to the interrogatories, which were not amended, plaintiffs submitted their case to the jury, and now contend on this appeal, that they were "'laid off to reduce the force' on February 27, 1959," because on that day the Globe-Democrat "contracted away the printing of its newspaper" sold the tools "necessary to fulfill

those operations," and notified plaintiffs of the sale. "Taken together," plaintiffs contend, "the circumstances operate to entitle respondents to dismissal pay under Article XII, Section 2 of their contract." This change in position apparently was believed necessary because the collective bargaining agreement upon which this suit is based, by its express terms, expired on December 31, 1958. It was then extended by oral agreement to March 2, 1959, but was not further extended insofar as the Globe-Democrat was concerned, and a new agreement was negotiated between Local No. 16 and the St. Louis Post-Dispatch only, which was executed on May 13, 1959, two weeks before the Guild strike was terminated. At that time each and all plaintiffs had accepted employment at the Post-Dispatch.

On this appeal the Globe-Democrat contends that plaintiffs are bound by their pleadings and the answers to their interrogatories and as a result they did not establish the occurrence of a layoff to reduce the force while a contract was in existence. It also contends that if the pleadings and answers to interrogatories be ignored and it be considered that plaintiffs' employment was terminated on February 27, for the reasons and under the circumstances contended by plaintiffs, the termination did not amount to a layoff to reduce the force. In view of our ruling on the second contention we need not rule the first.

The collective bargaining agreement does not provide for "dismissal pay" in all situations where the employment status is terminated, other than those specifically excepted, as do some and probably most labor agreements. See Globe-Democrat Publishing Company v. The Industrial Commission, Mo. App., 301 S. W. 2d 846; Talberth v. Guy Gannett Publishing Company, 149 Me. 286, 100 A. 2d 726, 40 A. L. R. 2d 1036; Matthews v. Minnesota

Tribune Co., 215 Minn. 369, 10 N. W. 2d 230, 147 A. L. R. 147; 40 A. L. R. 2d 1044. On the contrary, it provides for "dismissal pay" in only certain specifically defined situations, and in doing so it relieves the employer of any liability for "dismissal pay" in all other situations. In determining whether the termination of employment at the time and for the reasons asserted by plaintiffs constituted one of the specific situations in which dismissal pay is required to be paid, the collective bargaining agreement is subject to the same rules of interpretation as other contracts and should be realistically construed to accomplish its evident aims. 56 C. J. S., Master and Servant, § 28 (41)a.

Plaintiffs make no contention that they are entitled to "dismissal pay" pursuant to Section 1 of Article XII of the agreement. Their claim is based solely on the theory that their employment status was terminated on February 27, 1959, and that that termination constituted a layoff to reduce the force. "The term 'layoff', in the field of employment, has a well defined meaning. * * * It does not mean termination of employment, but rather does it mean: 'The act of laying off, esp. work or workmen; a period of being laid off or laid off work, a shutdown; a repsite.'" ACF Industries, Inc. v. Industrial Commission, Mo., 320 S. W. 2d 484, 494. As stated in 56 C. J. S., Master and Servant, § 29, "'**Labor separations**' are classified as 'quits,' * * *, 'discharges' * * *, and 'layoffs,' which have been defined as terminations of employment at the will of the employer, without prejudice to the worker, and may be due to lack of orders, technical changes, or the failure of flow of parts or materials to the job, as needed." A "layoff", as distinguished from a discharge, contemplates a period during which a working man is temporarily dismissed. Fishgold v. Sullivan Drydock & Repair Corp., 154 F. 2d 785, 788,

and it also refers to that suspension of work or employment during a part or season of the year when business activity is partly or completely suspended. Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275, 66 S. Ct. 1105, 1112, 90 L. Ed. 1230, 167 A. L. R. 110. See also Lord Mfg. Co. v. Nemenz, 65 F. Supp. 711; International Ass'n. of Machinists v. State ex rel. Watson, 153 Fla. 672, 15 So. 2d 485; Anderson v. Twin City Rapid Transit Co., 250 Minn. 167, 84 N. W. 2d 593; State ex rel. Ausburn v. City of Seattle, 190 Wash. 222, 67 P. 2d 913, 111 A. L. R. 418. An employee "laid off" does not have his employment status completely and finally terminated. He ordinarily is entitled to re-employment when the temporary situation calling for the layoff has been corrected or eliminated. The precise term used in this case was "laid off to reduce the force" which has reference to the situation where an employee is temporarily laid off with re-employment rights because neither he nor any one else is then needed to perform the work he ordinarily performed. This is to be distinguished from the situation where an employee is laid off for a temporary period for disciplinary reasons. In this latter situation there is no reduction in force. Yet, without the qualifying phrase "to reduce the force" being in the agreement the employer would be required to make payment of "dismissal pay", in such situations; a result obviously not intended. The collective bargaining agreement in this case used the term "laid off to reduce the force" in the above sense because it specifically provides that an employee "laid off due to a reduction in force" shall "hold re-employment rights in the chapel [place of employment] from which he was laid off for a period of one (1) year." While there is no separate provision in the agreement pertaining to "discharges" and "lay offs," reference is made in Article IX, pertaining to vacations, to "an employee discharged for cause." This indicates a knowl-

edge of the distinction between "lay offs" and "discharges".

On February 27, 1959, each plaintiff was not working because he was voluntarily refraining from reporting for work. He was not "laid off to reduce the force" because the termination of employment, even under plaintiffs' theory, was not intended to be temporary with re-employment rights. The termination of plaintiffs' employment was permanent and therefore they were "discharged". The collective bargaining agreement does not provide for "dismissal pay" to a "discharged" employee except as set forth in Section 1 of Article XII, and plaintiffs expressly disaffirm any claim pursuant to that provision. This construction of the agreement is consistent with its evident aims. A "discharged" employee is entitled to "dismissal pay" in the amount provided (which is greater than when laid off to reduce the force) when the discharge results from the specifically stated situations and he loses employment thereby. An employee is entitled to "dismissal pay" in a lesser amount when he is "laid off to reduce the force", that is, not for disciplinary reasons, with re-employment rights for one year. In this case neither factual situation came into existence.

The authorities cited and relied upon by plaintiffs are readily distinguishable. In Matthews v. Minnesota Tribune Co., 215 Minn. 369, 10 N. W. 2d 230, 147 A. L. R. 147, the collective bargaining agreement provided for severance pay "upon dismissal, except for drunkenness, proven dishonesty, or gross neglect of duty". The newspaper employer sold all of its business to another newspaper. The court held that when an employer disposes of all of his business, it operates as a discharge or dismissal of his employees. The right to severance pay accrued in the event of a dismissal except in three specifically defined situations. Here the right to dismissal pay ac-

crued, as far as plaintiffs are concerned, only in the event they were "laid off to reduce the force" and when they retained employment rights for one year. In re Public Ledger, 161 F. 2d 762, pertained to a bankruptcy proceeding. It was held that suspension of the business in bankruptcy amounted to a discharge of the bankrupt's employees, and that because of the use of the terms "layoff" and "discharge" in the collective bargaining agreement, "the 'layoff' provisions of the contract are in fact provisions covering discharge as well as temporary layoffs." While the language of that agreement may have justified the conclusion there reached, we find no reason to say in this case that both of the parties to the agreement intended to say one thing when they in fact said another. Plaintiffs also rely on the reported decisions in two arbitration cases. Regardless of the credence these two reports are entitled to receive, they do not support plaintiffs. In the Standard Oil of California case, 31 Labor Arbitration Reports, 472, the union there contended contrary to the position of plaintiffs in this case that the term "layoff" "refers to a temporary status, rather than a permanent termination of employment." The arbitrator held that in the contract "No clear distinction is made between a 'discharge' and a 'layoff'," and that the term "layoff" as used in the agreement was not limited to a temporary severance of employment but envisioned the possibility of a permanent separation. For the reasons previously stated, a clear distinction was made in the use of the terms in this case. In Brooklyn Eagle, 32 Labor Arbitration Reports, 136, plaintiffs quote not from the opinion but from the head note. In that case the newspaper permanently ceased all operations during a strike. The labor agreement provided for "severance indemnity" for "dismissal" except when for "dishonesty, repeated drunkenness after warning, gross neglect of duty or gross insubordination." This is in substance the same as the Matthews case.

The agreement in this case was negotiated by Fred A. Atkins on behalf of Local No. 16 who at time of trial had been a member of the union for fifteen years. He had been an officer of the union for ten years including seven years as president, and he had also served as business agent. The agreement was signed by Mr. Atkins and by Tom LaRocca, who participated in the negotiations and was "standing committee member on the Executive Board" of Local No. 16. The negotiators for the St. Louis Newspaper Publishers' Association were Richard G. Baumhoff and Munro Roberts from the Post-Dispatch and G. D. Bauman from the Globe-Democrat. It is not unreasonable to assume that all of these persons were familiar with the newspaper business and that they held themselves out, at least to some extent, as experts in the field of labor negotiations. The process of collective bargaining over the terms of a labor contract, at least in theory, results in demands, counter demands and concessions until an agreement is reached. It is not the situation where one party presents a written proposed agreement subject only to acceptance as presented or rejection. The process of collective bargaining necessarily implies that the terms of an approved agreement were thoughtfully prepared by persons seeking to express the precise agreement between the parties. In the absence of some reason to require a different rule, and we find none here, "The test of the meaning of words commonly used, should be their ordinary and popular meaning; and should not be construed in the broadest sense possible to include meanings to which they would not be applied by most people." Cleaver v. Central States Life Ins. Co., 346 Mo. 545, 142 S. W. 2d 474, 129 A. L. R. 1094. We have no right, in interpreting a collective bargaining agreement, to say that by the use of words and phrases which have well-defined and commonly understood meanings in the field of labor relations the parties

did not mean what they said. We cannot interpret such an agreement as we may think it should have been written. Neither can we interpolate words into an agreement which are not there and thereby rewrite the agreement to what third party beneficiaries of that agreement now argue the parties surely must have meant because otherwise the agreement does not favorably cover, as to them, a situation which subsequently arose. For all we know, the language used in the agreement was intentionally used as the result of a compromise between demands by the union for dismissal pay in the event of termination of employment for any reason and a demand by the employer representatives that there be no provision whatever for dismissal pay.

Plaintiffs were not "laid off to reduce the force" but were discharged, or at least their employment with the Globe-Democrat was permanently terminated. The terms of the collective bargaining agreement upon which plaintiffs rely do not impose an obligation on the Globe-Democrat to pay to plaintiffs "dismissal pay" under those circumstances, and no obligation for such payment exists in the absence of an agreement.

The judgment is reversed.

Per Curiam: The foregoing opinion by Stockard, C., is adopted as the opinion of the Court.

Alden A. Stockard, Commissioner.

Bohling, C., Concurs.

Barrett, C., Concurs.

All of the Judges Concur.

APPENDIX A (Continued).

Per Curiam Opinion of the Supreme Court of Missouri, June 4, 1963.

(R. 628 to 632.)

In the Supreme Court of Missouri,
Division Number Two.

Harry Irwin, Harry Nitzsche, James Rogers, John Finn, Tony Avola, Peter Hecke, Karl Zapf, Walter Williams, Murvale Guibor, Thomas LaRocca, Bernard Anselmo, Daniel Moriarity, Michael Buffa, Elmer Shirley, John Mangiapanello, Raymond Budo and Henry Lane,
Respondents,

v.

Globe-Democrat Publishing Company, a Corporation,
Appellant.

} No. 49,026.

Per Curiam:

Plaintiffs contend in their motion for rehearing that we did not "take into account section 301 (a) of the Labor Management Relations Act of 1947, 29 U. S. C. A., Section 185 (a), and the decided cases of the Supreme Court of the United States holding that there should be a uniform body of substantive law conformable to the federal law in the field of labor relations," and that in deciding issues arising out of collective bargaining contracts this court "was sitting as a court of the United States," and consequently it was bound by the Seventh Amendment to the Constitution of the United States.

We have examined plaintiffs' brief, filed in this court, and we fail to find any reference to the above contentions. Only one federal case was cited in their brief, In re Public Ledger, Inc., 161 F. 2d 762. Plaintiffs placed their complete reliance upon that case and upon cases from this and other states, and upon the report in two arbitration decisions, all of which we expressly considered in the opinion. It has long been the rule that new propositions and complaints not submitted in the original brief, Ford v. Wabash Ry. Co., 318 Mo. 723, 300 S. W. 769, 778, and raised for the first time after the opinion is handed down, Phippin v. Missouri Pacific R. Co., 196 Mo. 321, 93 S. W. 410, 418, of which are clearly afterthoughts, State ex rel. Cole v. Matthews, Mo., 274 S. W. 2d 286, 292, will not be considered on motion for rehearing. We do not propose now to change or relax that rule. However, if in a suit in a state court on a collective bargaining agreement by an employee we are required to apply "federal substantive law," and we did not do so and the result reached is contrary to such law, then plain error would have resulted. In our discretion we may consider plain error affecting substantial rights, Civil Rule 79.04, V. A. M. R., and on that discretionary basis we shall examine the contention, presented now for the first time, that we erred in not ruling the case pursuant to "federal substantive law" which plaintiffs at no time urged.

Section 301 (a) of the Labor Management Relations Act of 1947, 29 U. S. C. A., Section 185 (a), provides as follows: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the

parties." In Smith v. Evening News Association, 371 U. S. 195, 83 S. Ct. 267, 9 L. Ed. 2d 246, the United States Supreme Court, speaking through Mr. Justice White, stated that this section "has substantive content and that Congress has directed the courts to formulate and apply federal law to suits for violation of collective bargaining contracts." Quoting then from Local 174, Teamsters, etc., v. Lucas Flour Co., 369 U. S. 95, 82 S. Ct. 571, 7 L. Ed. 2d 593, the court also said: " 'The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.' "

Plaintiffs assert that because "federal law" is to be applied to this case the "opinion should be reviewed to determine if it is harmonious with the body of substantive law in the field of labor relations as promulgated by the federal courts," and that if it is not this court should modify its opinion to so conform. The "body of substantive law," relied upon by respondents in their motion for rehearing, and in the suggestions in support thereof, consists of but one federal case (another federal case is cited in support of a different point), the same one cited in their original brief to this court, In re Public Ledger, Inc., 161 F. 2d 762, and their argument pertaining to the substantive law of that case is precisely the same as that presented in their original brief which we carefully considered and rejected as decisive of the issue on appeal. Upon re-examination we are still of the opinion that In re Public Ledger, Inc., does not require nor justify a ruling different from that reached in the principal opinion.

In the preparation of the principal opinion we ruled the issues by giving the language of the contract its normal meaning in accordance with its accepted usage. In determining this meaning we looked not only to the one federal

case and the numerous state cases cited by respondents, but we also looked to and relied on other cases found by us in the course of our research, including two cases in the lower federal courts and one opinion of the Supreme Court of the United States. No federal case was then found, none has been found upon re-examination, and respondents certainly have cited no federal case which, in the words of Mr. Justice White, formulates and applies federal law which would require or justify a result different from that we reached in the principal opinion. Assuming, therefore, that in this suit we were required to apply federal substantive law, it is our conclusion that we did so, and that we did so correctly. There is absolutely nothing in Smith v. Evening Press Association, or the other federal cases cited by plaintiffs in the motion for rehearing, which directly or inferentially holds that the result we reached is contrary to federal substantive law, and plaintiffs certainly have not demonstrated that on the merits we reached an incorrect result.

We do not agree, assuming we are required to apply federal substantive law, that in doing so this court "was sitting as a court of the United States" any more than it is sitting as a court of a sister state when it applies the law of that state. Therefore, there is no merit to the contention that the Seventh Amendment to the Federal Constitution has any application to this case.

All other matters in the motion for rehearing have been carefully considered and are found to be without merit, and the motion for rehearing is overruled.

Respondents also assert that because of the issues presented for the first time in their motion for rehearing "there is now involved in this cause a federal question," and they are entitled to have this case transferred to the court en banc.

Section 9, Article V, Constitution of Missouri, provides that a cause shall be transferred to the court en banc when (a) the members of a division are equally divided in opinion, (b) when the division shall so order, (c) on the application of the losing party when a member of the division dissents from the opinion therein, (d) when "a federal question is involved," and (e) pursuant to Supreme Court rule. This court has held that the term "federal question" as used in Section 9 of Article V is to be "interpreted according to the standard" contained in Section 3 of Article V, pertaining to jurisdiction of the Supreme Court, which refers to "cases involving the construction of the Constitution of the United States or of this state, the validity of a treaty or statute of the United States, or any authority exercised under the laws of the United States, * * *." McAllister v. St. Louis Merchants' Bridge Terminal Ry. Co., 324 Mo. 1005, 25 S. W. 2d 791; Huckleberry v. Missouri Pac. R. Co., Mo. Sup., 26 S. W. 2d 980, 988; Pashea v. Terminal R. Ass'n of St. Louis, 350 Mo. 132, 165 S. W. 2d 691, 696; State ex rel. Perrine v. Kerman, 361 Mo. 871, 237 S. W. 2d 156. This case, as submitted to this court, did not involve a federal question. New matters not submitted in the original brief, but raised for the first time in a motion for rehearing after the opinion is handed down do not present any federal question requiring a transfer to the court en banc. No Supreme Court rule requires a transfer of this case, and after careful consideration we conclude that no reason exists for this division to order a transfer. The alternative motion to transfer to the court en banc is denied.

APPENDIX B.

Judgment.

Entered April 8, 1963 (R. 592).

Harry Irwin, Harry Nitzsche, James Rogers, John Finn, Tony Avola, Peter Hecke, Karl Zapf, Walter Williams, Murvale Guibor, Thomas LaRocca, Bernard Anselmo, Daniel Moriarity, Michael Buffa, Elmer Shirley, John Mangiapanello, Raymond Budo and Henry Lane,

Respondents,

vs.

Globe-Democrat Publishing Company, a Corporation,

Appellant.

Appeal from the Circuit Court of the City of St. Louis.

Now at this day come the parties aforesaid, by their respective attorneys, and the court being sufficiently advised in the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which it has lost by reason of the said judgment; and that the said appellant recover against the said respondents its costs and charges herein expended, and have execution therefor. (Opinion filed.)

APPENDIX C.

Filed April 23, 1963.

(R. 605 to 607.)

In the Supreme Court of Missouri,
Division Number Two.

Harry Irwin, Harry Nitzsche, James Rogers, John Finn, Tony Avola, Peter Hecke, Karl Zapf, Walter Williams, Murvale Guibor, Thomas LaRocca, Bernard Anselmo, Daniel Moriarity, Michael Buffa, Elmer Shirley, John Mangiapanello, Raymond Budo and Henry Lane,
Respondents,

vs.

Globe-Democrat Publishing Company, a Corporation,
Appellant.

No. 49,026.

Appeal from the Circuit Court of the City of St. Louis
(The Honorable O. P. Owen, Judge).

Respondents' Motion for Rehearing or, in the Alternative, for Transfer to the Court En Banc.

Come now respondents and in support of their motion for a rehearing or, in the alternative, for transfer to the court en banc do respectfully state:

1. **The Court's Opinion Has Usurped Respondents' Right to a Trial by Jury**

for the reason that the jury found as a fact, specifically, that respondents were laid off to reduce the forces of the Globe-Democrat Publishing Co. as a result of the sale of the newspaper printing plant to Pulitzer Publishing Co. and of the contract with Pulitzer providing for the performance of respondents' duties by Pulitzer employees.

This court is bound by the facts as found by the jury and by its own opinion which holds that the language cannot be interpreted, interpolated into, or re-written as the court has done by its opinion in changing the issue as submitted to the jury in this case from what constitutes the phrase "laid off to reduce the force" into an issue of what constitutes the word "discharge", a word not appearing in the clause in question. The court's opinion has thus and thereby taken the case away from the jury.

2. **The Opinion of the Court Has Contravened Section 1. of Amendment XIV of the United States Constitution.**

The facts showing violation of these provisions are:

A. By its opinion this court is attempting to make and enforce the law which does not take into account section 301 [illegible] of the Labor Management Relations Act of 1947, 29 USCA, Section 185 (a), and the decided cases of the Supreme Court of the United States holding that there should be a uniform body of substantive law conformable to the federal law in the field of labor relations.

3. **The Court's Opinion Has Contravened the Seventh Amendment to the Constitution of the United States** for the reason that under the laws promulgated by the Supreme Court of the United States it is the federal law that must be applied by a court in deciding issues such as are raised here arising out of collective bargaining contracts and in so applying this law the court was sitting as a court of the United States and consequently bound by the above amendment. The specific contravention of the amendment committed as a result of the opinion was the re-examination by this court of the ultimate facts of the case which had heretofore been tried by a jury and determined by them in respondents' favor and against appellant Globe-Democrat Publishing Company in a manner contrary to the rules of the common law all to respondents' prejudice.

4. **For All of the Above Reasons the Effect of the Court's Opinion Is to Violate Article I, Section 10 of the Constitution of Missouri, as well as Article I, Section 29 thereof**

for the reason that the court overrode the finding of the jury as to the meaning of the term "laid off to reduce the force" without a proper reason for so doing.

5. **Because There Is Now Involved in This Cause a Federal Question Under the Above Authorities Respondents are Entitled in Article V, Section 9 of the Missouri Constitution, on Its Face, to a Transfer to the Court En Banc**

for the reason that federal questions are involved as well as questions of public interest in correctly deciding the law.

Wherefore, the premises considered, respondents pray that their motion for rehearing be granted, or in the alternative, that this cause be transferred to the Supreme Court en banc.

Respectfully submitted,

(s) William A. Geary, Jr.,

William A. Geary, Jr.,
318 North Eighth Street,
St. Louis 1, Missouri,
GArfield 1-0390,
Attorney for Plaintiffs-Respondents.

Copy of the within Motion delivered to Hocker, Goodwin and MacGreevy, attorneys of record for defendant, 411 North Seventh Street, St. Louis 1, Missouri, this 22 day of April, 1963.

(s) William A. Geary, Jr.

Receipt acknowledged: 4/22/63.

(s) Lon Hocker.

APPENDIX D.

Filed April 23, 1963.

(R. 608 to 615.)

In the Supreme Court of Missouri,
Division Number Two.

Harry Irwin, Harry Nitzsche, James Rogers, John Finn, Tony Avola, Peter Hecke, Karl Zapf, Walter Williams, Murvale Guibor, Thomas LaRocca, Bernard Anselmo, Daniel Moriarity, Michael Buffa, Elmer Shirley, John Mangiapanello, Raymond Budo and Henry Lane,

Respondents,

vs.

Globe-Democrat Publishing Company, a corporation,

Appellant.

No. 49926.

Suggestions in Support of Respondents' Motion for a Rehearing or, in the Alternative, for Transfer to the Court En Banc.

1. The Court's Opinion Has Usurped Respondents' Right to a Trial by Jury.

The opinion of this court has usurped respondents' right to a jury trial because it has ruled diametrically to the finding of the jury. The question as to the meaning of the words "laid off to reduce the force" was presented to the jury by appropriate instruction and in find-

ing in the favor of respondents, it must be presumed that the jury found the meaning of these words to include a permanent layoff as well as a temporary one. Had this court ruled that the meaning of the words "laid off to reduce the force" was simply a matter of interpretation then it would have been a legal question for the court and this matter should not have been submitted to the jury. This court did not so rule.

If this court had found that the words "laid off to reduce the force" were ambiguous but that this phrase was a technical phrase and that the admission of expert testimony was appropriate to discover their meaning, this court could either have remanded the case for the introduction of such testimony or, as was its right, looked to the technical meanings available to it by appellant's offers of proof. If the court then found the meaning of the term "laid off to reduce the force" to mean temporary lay-offs only, it could have reversed the judgment below without remand. This the court did not do.

If this court had found that the phrase "laid off to reduce the force" was not a technical phrase but was ambiguous, it would then be obliged to accept the finding of the jury in favor of respondents unless the evidence was so clear that no reasonable person could come to the conclusion the jury did on the basis of the evidence adduced. In that case, the court could have reversed the case outright. This the court did not do either.

It is impossible to tell from the opinion on what basis the court arrived at its decision to override the jury and to make a finding of fact as to the meaning of the words "laid off to reduce the force" which was absolutely contrary to the jury's finding.

The opinion of this court has usurped respondents' right to a trial by jury because it has erroneously attempted

to interpret, interpolate into and rewrite the contract in question. Nor is the court construing terms. Examination of the court's opinion reveals it does not construe or define the pertinent phrase of the jury's charge but rather attempts to define what the phrase "laid off to reduce the force" is not.

In doing this it is doing so contrary to former appellate decisions holding:

> And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable. Nance v. Atchison, Topeka and S. F. Ry. Co., 232 S. W. (2) 547, 360 Mo. 980, as well as Conner v. Nejswander, 232 S. W. (2) 469, 360 Mo. 1074, wherein it was held "On appeal a jury's verdict supported by substantive evidence should not be disturbed by the Supreme Court." Also Higgins v. Terminal Ry. Assoc. of St. Louis, 241 S. W. (2) 380, 362 Mo. 264.

In Cross v. Pasley, 267 F. (2) 824, it was held, "it is not the province of the reviewing court to infer material facts." This seems to have been done in the instant case. Whether or not the facts (as found by the jury) constituted a "discharge" is not at issue as inferred by the court's opinion. The issue is the jury's charge, that is, whether **the facts as found by the jury** constitute respondents being "laid off to reduce the force," no more, no less; no matter whether of temporary or permanent duration. The issue is not, whether the **facts as found by the jury** constitute a "discharge".

Are we to understand the court's opinion to hold the very language of the contract not to mean exactly what

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it says? The words of the jury's charge were lifted right out of the contract, "word for word". No words of limitation or qualification would have been thinkable in the jury's charge as has been inferred in the court's opinion. And further, the jury's charge was tail-ended so as to overcome any adverse theory of defendant Globe-Democrat Publishing Co.

Concerning the constitutional guarantee of a right to trial by jury, it has been said: "The right to a jury trial is immemorial. It was brought from England to this country by the colonists, and it has become a part of the birthright of every free man. It is a right which is justly dear to the American people, and one which is expressly guaranteed by the Federal Constitution and by the Constitution of several states." 31 Am. Jur., Jury, Section 3, pp. 552-3. The same authority says: "The constitutional right to a jury trial, where and in so far as it exists, cannot be made a nullity, destroyed, annulled, obstructed, impaired or restricted by legislative or judicial action." 31 Am. Jur., Jury, Section 7, p. 556.

Paraphrasing the court's language in the case of Dowell v. City of Hannibal, 200 S. W. (2) 546 at 555, it may be said: "In view of these fundamental guarantees of a trial by jury, this court should never have taken this case from the jury, unless there was no question of fact to be submitted to the jury." Under all the facts and circumstances of this case, the question as to whether respondents were "laid off to reduce the force" was one for the determination of the jury.

And further paraphrasing the holding in Murray v. St. Louis Public Service Co., 201 S. W. (2) 775 at 781, it may be said: "The matter presented by this motion goes to the question of the right of trial by jury. At times cases are presented where the judge feels that if he had

been on the jury he would have decided different than the jury decided. Nevertheless, where there is substantial evidence, and the case is to be determined on the greater weight of the evidence and the credibility of the witnesses, as in this case, the appellate judges have no right to interfere with the jury's verdict. Section 22, Article I of the Constitution of Missouri, Mo. R. S. A., provides that the right of trial by jury as heretofore enjoyed shall remain inviolate, and Section 98, Civil Code of Missouri, Mo. R. S. A., Section 847.98, provides that the right of trial by jury as declared by the Constitution or as given by a statute shall be preserved to the parties inviolate. To this wise and time honored provisions, judges must adhere."

Nance v. Atchison, Topeka and S. F. Ry. Co., 232 S. W. (2) 547, 360 Mo. 980;
Conner v. Noiswander, 232 S. W. (2) 469, 360 Mo. 1074;
Higgins v. Terminal Ry. Assoc. of St. Louis, 241 S. W. (2) 380, 362 Mo. 264;
Cross v. Pasley, 267 F. (2) 824;
31 Am. Jur., Jury, Section 3, pp. 552-3;
31 Am. Jur., Jury, Section 7, p. 556;
Dowell v. City of Hannibal, 200 S. W. (2) 546 at 555;
Murray v. St. Louis Public Service Co., 201 S. W. (2) 775 at 781.

2. The Opinion of the Court Has Contravened Section 1 of Amendment XIV of the United States Constitution.

Section 1 of Amendment XIV reads in part as follows:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process

of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The facts showing violation of these provisions are:

A. By its opinion this court is attempting to make and enforce law which does not take into account Section 301 (a) of the Labor Management Relations Act of 1947, 29 U. S. C. A., Section 185 (a); and the decided cases of the Supreme Court of the United States in this regard.

The section referred to is set out as follows:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

The holding in the case of Smith v. Evening News Association, 83 S. Ct. 267, decided December 10, 1962 (consequently not before respondents when this case was briefed and argued), requires this court to apply federal law to collective bargaining contracts under the above statute. The holding of this division is contrary to the federal law.

In Re Public Ledger, Inc., 161 F. (2) 762 at 770 holds, **"Layoff" provisions of the** (collective bargaining) **contract are in fact provisions covering discharge as well as temporary layoff.** Emphasis ours.

Although this court agrees with this "construction" (Opinion, p. 9), it rules in the face of it and contrary to it (Opinion, p. 11). If, as we believe, this divisional

opinion holds that the term "laid off to reduce the force" has a commonly accepted meaning universally known, this court should take judicial notice of the fact that the term "laid off" is used indiscriminately to mean (1) a temporary cessation of employment, (2) a cessation of employment that may be either temporary or permanent and (3) a cessation of employment that is permanent. The distinction between a "lay off" which is to be permanent and a "discharge" is that a "discharge" is for good cause while a "lay off" occurs through no fault of the workman. Very often, at the time the "lay off" occurs it is impossible to tell whether it is temporary or permanent. The term "lay off" is commonly used as a euphemistic expression for "fired", "discharged", "severed", "furloughed indefinitely", etc. This division's opinion makes it relatively easy for an employer to sidestep its contractual obligations by calling a permanent layoff a temporary layoff. Thus, the employee is deprived of his rights because he was not discharged nor was he laid off. In either case, contrary to the contract the employer sidesteps its obligation.

The divisional opinion should be reviewed to determine if it is harmonious with the body of substantive law in the field of labor relations as promulgated by the federal courts. If it is not, it is incumbent upon this court to modify its opinion to so conform.

Section 1, Amendment XIV of the Constitution of the United States;
29 U. S. C. A., Section 185 (a);
Smith v. Evening News Assn., 83 S. Ct. 267;
In Re Public Ledger, 161 F. (2) 762.

3. **The Court's Opinion Has Contravened the Seventh Amendment to the Constitution of the United States.**

This precise charge has not been judicially decided to respondents' knowledge but is now raised in view of the holding in the Smith v. Evening News case, supra, which determines with finality that Section 301 of the Taft-Hartley Act, supra, has substantive content and that federal law now must be applied even by State courts in ruling on violations of collective bargaining contracts.

Are they, the State courts, as a consequence, not now sitting in deciding these cases as a federal court? Or, at least, are not the litigants affected by these decisions not entitled to the full substantive law of the United States which includes the Seventh Amendment to the Constitution of the United States.

If the answers to these questions are in the affirmative it follows that the court should have followed the federal law in construing the instant contract phrase as the federal courts have in the In Re Public Ledger case, supra. The re-examination of facts made by the court in the instant case in respondents' judgment take this court's opinion outside of the rules of the common law and consequently violate the provisions of the Seventh Amendment to the U. S. Constitution.

Smith v. Evening News Assn., 83 S. Ct. 267.

4. **For All of the Above Reasons the Effect of the Court's Opinion Is to Violate Article I, Section 10 of the Constitution of Missouri as Well as Article I, Section 29 Thereof.**

Article I, Section 10, reads as follows:

> Section 10. Due process of law.—That no person shall be deprived of life, liberty or property without due process of law.

Article I, Section 29, reads as follows:

> Section 29. Organized labor and collective bargaining.—That employees shall have the right to organize and to bargain collectively through representation of their own choosing.

In shunting aside the jury's finding as to the meaning of the term "laid off to reduce the force" without a proper reason for so doing, the division is in violation of both of the above provisions of the Constitution of the State of Missouri.

Article I, Section 10, Constitution of Missouri;
Article I, Section 29, Constitution of Missouri.

5. Because There Is Now Involved in This Cause a Federal Question Under the Above Authorities Respondents Are Entitled in Article V, Section 9 of the Missouri Constitution, on Its Face, to a Transfer to the Court en Banc.

Article V, Section 9, reads as follows:

> Section 9. Transfer of causes to supreme court en banc.—A cause in the supreme court shall be transferred to the court en banc when the members of a division are equally divided in opinion, or when the division shall so order, or on application of the losing party when a member of the division dissents from the opinion thereof, or a federal question is involved, or pursuant to supreme court rule.

In view of the federal questions involved and also by reason of the public interest involved in correctly deciding the law, plaintiffs should be granted a re-hearing or a transfer to the court en banc.

Article V, Section 9, Constitution of Missouri.

Wherefore, the premises considered respondents pray that their motion for re-hearing be granted or in the

alternative that this cause be transferred to the Supreme Court en banc.

Respectfully submitted,

William A. Geary, Jr.

William A. Geary, Jr.,
Attorney for Respondents,
318 North 8th Street,
St. Louis 1, Missouri,
GArfield 1-0390.

Copy of the within suggestions in support of motion for rehearing or, in the alternative to transfer to the court en banc delivered to Hocker, Goodwin, and MacGreevy, attorneys of record for defendant, 11 North 7th Street, St. Louis, Missouri, this 22 day of April, 1963.

W. A. Geary, Jr.

Receipt acknowledged: 4/22/63.

/s/ Don Hocker.

APPENDIX E.

Order.

Entered June 4, 1963 (R. 627).

Harry Irwin et al., Respondents,

vs.

Globe-Democrat Publishing Company, a corporation, Appellant.

Now at this day the court having seen and considered the motion of the respondents for a rehearing in the above entitled cause, or in the alternative, for transfer of this cause to the court en banc, doth order that said motion be and the same is hereby overruled in a per curiam opinion filed.

APPENDIX F.

The Fourteenth Amendment, United States Constitution.

Section 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a senator or representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States or under any state, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support

the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave, but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U. S. C. A., Const. Amend. XIV, p. 288.

APPENDIX G.

The Seventh Amendment, United States Constitution.

In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, then according to the rules of common law.

U. S. C. A., Const. Amend. VII, p. 134.

APPENDIX H.

The Labor Management Relations Act, Section 301 (a).

Section 185. Suits by and against labor organizations—Venue, amount, and citizenship.

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. 29 U. S. Code, Section 185.(a). June 23, 1947, c. 120, Title III, Sec. 301, 61 Stat. 156.

APPENDIX I.

State Courts; Appeal; Certiorari.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States: June 25, 1948, c. 646, 62 Stat. 929, 29 U. S. Code, Sec. 1257.

Office-Supreme Court, U.S.
FILED
SEP 25 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1963.

No. 415

HARRY IRWIN, et al.,
Petitioners,
vs.
GLOBE-DEMOCRAT PUBLISHING COMPANY,
a Corporation,
Respondent.

BRIEF

In Opposition to Certiorari.

LON HOCKER,
411 North Seventh Street,
St. Louis, Missouri, 63101,
Attorney for Respondent.

Of Counsel:
HOCKER, GOODWIN & MacGREEVY,
411 North Seventh Street,
St. Louis, Missouri, 63101.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1963.

No.

HARRY IRWIN, et al.,
Petitioners,

vs.

GLOBE-DEMOCRAT PUBLISHING COMPANY,
a Corporation,
Respondent.

BRIEF
In Opposition to Certiorari

QUESTIONS PRESENTED FOR REVIEW

Respondent is dissatisfied with petitioners' questions, because, for the reasons set out in argument, I, *infra*, p. 3, the questions postulate a jurisdictional fact not appearing of record.

STATEMENT OF CASE

Petitioners' statement of the case is in error. It includes a statement of jurisdictional fact not appearing of record. See argument, I, *infra*, p. 3.

SUMMARY OF ARGUMENT

I. Petitioners' Questions Presented for Review do not exist on the record here; for they include the jurisdictional assertion that respondent was "in an industry affecting commerce" which is neither pleaded, proved nor admitted.

II. The Missouri Court did not decide a federal question.

III. The Missouri decision was founded upon adequate independent dispositive non-federal grounds.

IV. Petitioners are estopped from alleging error in the decision of this case under standards of local contract law, rather than of federal law; because petitioners presented their case, both at trial and on appeal, on this very theory.

ARGUMENT

I

Petitioners' "Questions Presented for Review" (Pet'n p. 3) are not presented by their record. They therefore do not comply with Rules 15.1 (e) (1) and 40.1 (d) (1) of this Court, which require questions presented for review to be "expressed *in the terms and circumstances of the case*".

Question 1 postulates (p. 3) that "respondent employer" was "in an industry affecting commerce".

Question 2 incorporates this postulate by reference (p. 4).

Petitioners' Statement of Material Facts (Pet'n p. 6) contains the following assertion:

> "Respondent here (defendant) is a newspaper publishing company *engaged in an industry affecting commerce as defined in the Labor Management Relations Act of 1947*, 29 U. S. Code, Secs. 142, 152."

Rule 40.1 (e) of this court requires that statements of fact of this sort be supported by reference to the record. No record reference is given. The lack of record support is obscured by placing the statement amidst a recital of agreed-to facts. It is preceded by a sentence beginning: "It was stipulated * * *". It is followed by a paragraph beginning: "It was *further* admitted * * *" (Pet'n. p. 6) (*What is the antecedent to which the author meant that this court should apply the word "further"?*).

The fact is, not only that there was no such stipulation nor admission, but also that there was no such evidence. More important, in the present posture of the case, there

was never any occasion for either such admission or evidence: *There is not, and there never was, any allegation in petitioners' Missouri pleadings, suggestions, briefs or motions of any such fact* (R. pp. 2-7; R. pp. 1-521; Pet. 1-36 a).

On the contrary, the correlative allegation of the petitioners' petition, on which the right to recover is even now predicated is (R. p. 2):

> "1. The defendant, Globe-Democrat Publishing Company, is a corporation duly organized and existing under the laws of the State of Missouri, and is at all times hereinafter mentioned doing business in the City of St. Louis, State of Missouri, publishing a daily newspaper in said City and State."

This was, and remains, an invocation of rights under Missouri's substantive law, not of rights under the federal statute; because no right to relief predicated upon § 301, (a), L. M. R. A., can exist unless the employees involved be in an industry affecting commerce. 29 U. S. C. 185 (a). This fact, if it be one, was never before the Missouri Courts, and despite its sly importation here, it is not before this Court.

The questions presented are thus a sham, on this record, for a fundamentally requisite fact for jurisdiction in this court (recognized as such by petitioners' very petition) *is simply not in the record*. The writ should be denied.

II.

We recognize the rule, that where petitioners for certiorari have invoked a federal right too late (or otherwise incorrectly) under State procedure, yet if the State court in fact decides this federal question thus imperfectly raised, this court may review the decision of the federal question.

The rule is not applicable here; because the court did not decide the federal question belatedly raised; and because of two most fundamental and supervening rules of law, one of jurisdiction, and one of justice, which will be discussed under Points III and IV.

The federal question raised by petitioners in their motion to rehear or transfer is stated in the following words (Pet'n. p. 26-a):

> "The holding in the case of Smith v. Evening News Association, 83 S. Ct. 267, decided December 10, 1962 (consequently not before respondent when this case was briefed and argued), requires this court to apply federal laws to collective bargaining contracts under the above statute. The holding of this division is contrary to the federal law."

Thus, the federal question raised was in two parts: (a) that the court must apply federal law; (b) that the law applied was contrary to the federal law.

Examination of the *per curiam* opinion shows that the court *assumed, but did not decide*, the first half of this question, and, as to the second half of the question held that no federal law to which it had been cited, or which it had found, demonstrated the alleged contrariety.

Thus:

(p. 13 a): "However, . . . we are required to apply certain federal substantive law, and we did not do so, and the result reached is contrary to such law, then plain error would have resulted."

(p. 15 a): "No federal case was then found." Since the preparation of the principal opinion "none has been found upon re-examination, and respondents certainly have cited no federal case which, in the words of Mr. Justice White, formulates and applies federal

law which would require or justify a result different from that which we reached in the principal opinion. *Assuming*, therefore, that in this suit we were required to apply federal substantive law, it is our conclusion that we did so, and that we did so correctly."

(p. 15a) "We do not agree, *assuming* that we are required to apply federal substantive law, that in doing so this court 'was sitting as a court of the United States' any more than it is sitting as a court of a sister state when it applies the law of that state."

The basic federal question raised here is the applicability, *vel non*, of federal substantive law as the criterion for decision. This question was not decided by the Supreme Court of Missouri; and there is nothing, therefore, to review here.

III

In any application here for review by certiorari, the decision for review as to the federal right claimed must have been a decision which controlled the result of the case. If there be in addition an adequate independent dispositive non-federal ground for the decision, it would do no good to review, and mayhap reverse, the decision of the federal question, since the judgment, on the other stated grounds, must go the same way, regardless of the outcome of the review of the federal question.

The principal involved is unanimous and unequivocal, and iterated in a line of Supreme Court opinions, the latest of which (as we read the reports) is Fay v. Noia, U. S. , 83 S. Ct. 822 (1963). In this opinion the rule is stated as follows (l. c. 843):

"It is a familiar principle that this court will decline to review state court judgments which rest on

independent and adequate state grounds, notwithstanding the co-presence of federal grounds [Citing authorities]. Section 25 of the Judiciary Act of 1789, c. 20, 1 Stat. 86-87, denied this Court power to base the reversal of a state court decision on any error other than such as * * * immediately respects * * * questions of validity or construction of the said (Federal) Constitution, treaties, statutes, commissions, or authorities in dispute * * *' Murdock (v. Memphis) was a case involving state substantive grounds, but the principle is also applicable in cases involving procedural grounds."

Radio Station WOW v. Johnson, 326 U. S. 120, 128, 129, 65 S. Ct. 1475, 1480, applied the principle directly to facts legally indistinguishable from those before us in this matter, viz.:

"Here the Nebraska Supreme Court held that the federal question had dropped out as a matter of pleading and also denied its merits.

"This brings the situation clearly within the settled rule whereby this Court will not review a state court decision resting on an adequate and independent non-federal ground even though the state court may have also summoned to its support an erroneous view of federal law (quoting authority)."

Here the Missouri Supreme Court did adhere to its first decision on local procedural grounds: that the alleged federal question was raised too late. The *per curiam* opinion concludes as follows (Pet'n. p. 16a):

"This case, as submitted to this court, did not involve a federal question. New matters not submitted in the original brief, but raised for the first time in a motion for rehearing after the opinion is handed down do not present any federal question requiring

a transfer to the court en banc. No Supreme Court rule requires a transfer of this case, and after careful consideration we conclude that no reason exists for this division to order a transfer. The alternative motion to transfer to the court en banc is denied.[8]

IV

Petitioners' application for the writ violates a fundamental principle of justice, and of law, that a reviewing court will not consider as error any ruling of a lower court induced by the party claiming the error.

The great text books state the rule as follows:

"An appellant or plaintiff in error is estopped, or will not be permitted, to take advantage of errors for the commission of which he was responsible, or which he himself committed, caused, brought about, provoked, participated in, created, or helped to create, or contributed to, or which he has invited or induced the trial court to commit, as where the ruling, or error, was made at his request or suggestion, or on his urging, or where he procured the making of the ruling, or the taking of the action." 5 C. J. S., Appeal and Error, § 1501.

"The rule is well settled that a party cannot successfully complain of error for which he is himself responsible, or of rulings which he has invited the trial court to make." 3 Am. Jur., Appeal and Error, § 276.

Petitioners' charge of error here is that the Missouri Supreme Court based its decision on principles of Missouri constitutional law. They elude it essentially for having done so. [illegible] Petition, p. 10, and they say in their petition for the writ, p. 21:

[illegible]

"From that line of cases represented by the **Lucas Flour**, **Lincoln Mills** and the **United Steelworkers Trilogy** cases, cases requiring the application of federal substantive law, it becomes apparent *this case cannot be decided in the strict, cramped, quarters of local contract law, third party beneficiary rules, or even the 'normal meaning of words.'*"

But, cramped or not, these were the very quarters delineated by petitioners from the filing of their petition through the rendition of the appellate opinion; it was petitioners themselves who invoked, throughout, local contract law as the source of their rights, and who urged that their claimed rights be vindicated under local contract law.

Petitioners concede that their first mention of the applicability of federal law came after the case had been decided on appeal. In their petition for the writ they say (Pet. 5):

"The first opportunity to do this was in petitioners' Motion for Rehearing, etc., and Suggestions. . . ."

(Incidentally, this statement is belied by petitioners' own statement, quoted next above, that the Lucas Flour, Lincoln Mills, and the United Steelworkers Trilogy cases—all of which preceded the argument of this case—are "cases requiring the application of federal substantive law".)

(a) We have shown (Point I, *supra*) that plaintiff's *nisi prius* petition *still* invokes local contract law. Missouri procedural law requires that while our courts will take judicial notice of state and federal statutes (490.080, Mo. R. S.), these laws must be invoked in the pleading if they are to be applied (490.110 Mo. R. S. 1959).

In Robinson v. Gaines, 331 S. W. 2d 653, 655, the Missouri Supreme Court had ruled (1960):

> "We now take judicial notice of the public statutes and judicial decisions of a sister state" [the Missouri statute includes "and other jurisdiction of the United States"] "when a pleading 'relies upon the law of another state or contains allegations which show that the law of another state must be applied.'"

In the absence of such a pleading the case is tried "under our general law": *ibid.*

Thus, the petition, not invoking extra-Missouri law, did invoke Missouri general law.

(b) Plaintiffs' theory of law is embodied in their offered instructions (R. 363, *et seq.*). None of these required the finding that the employment was in an industry affecting commerce, requisite to take the case out of general Missouri contract law, nor is there anything in their requests which indicates that they sought to invoke Federal law.

(c) It is clear that no invocation of law other than local contract law appeared in petitioners' brief on appeal. The *per curiam* opinion says:

> "We have examined plaintiffs' brief filed in this court, and we fail to find any reference to the above [federal law] contentions." (App., p. 13a.)

Under these circumstances, the rule invoked by plaintiffs themselves as Point VII c of their brief in the Missouri Supreme Court, a copy of which we have filed here, destroys their application for the writ of this court. These are the words that Petitioners there used, and which here they must eat:

> "A party cannot complain of errors invited by himself." Myers v. Buchanan, 333 S. W. (2d) 18."

CONCLUSION

It is respectfully submitted that on the rules of this court, and for lack of jurisdiction, and because of their estoppel, petitioners' application should be denied.

LON HOCKER,
411 North Seventh Street,
St. Louis, Missouri, 63101,
Attorney for Respondent.

Of Counsel:

HOCKER, GOODWIN & MacGREEVY,
411 North Seventh Street,
St. Louis, Missouri, 63101.